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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-1422

THE CINCINNATI ENQUIRER, INC. and AMERICAN FINANCIAL CORPORATION,
Petitioners,

v.

JEAN WHITEHOUSE RAMEY; ANGIOLINA MORELLI; ALBERT HARRIS; THE E. W. SCRIPPS COMPANY, THE SCRIPPS-HOWARD INVESTMENT COMPANY, and JACK R. HOWARD; and CECIL F. SCHOEN, a.k.a. CECILE F. SCHOEN,
Respondents.

RESPONDENT CECIL F. SCHOEN'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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OPINIONS BELOW

The opinion of the Sixth Circuit Court of Appeals is reported at 508 F. 2d 1188 (6th Cir. 1974) and appears at Appendix C of the Petition, 15a-36a. The opinion of the United States District Court for the Southern District of Ohio (unreported) appears at Appendix E of the Petition, 41a-63a.

I JURISDICTION

Inasmuch as the disputes and issues herein involved are essentially private with no constitutional overtones, this cause is not sufficiently important or substantial to warrant the granting of the petition for certiorari, nor is there any basis for this Court's exercise of its jurisdiction as the record below clearly supports the judgment of the Sixth Circuit Court of Appeals.

II THE WRIT SHOULD BE DENIED BECAUSE NO ISSUE WAS DECIDED INCORRECTLY BELOW UNDER THE APPLICABLE DECISIONS OF THIS COURT AND OTHER FEDERAL COURTS

In 1970, three derivative shareholders actions and one combined derivative and class action (The *Schoen* case) with both derivative and class allegations based in part upon the 1934 Securities and Exchange Act, §§ 10, 15 U.S.C.A. § 78j, §§ 14(a) and 14(e), 15 U.S.C.A. § 78n and pendent claims, were begun against the Cincinnati Enquirer, Inc. and others. The three solely derivative actions sought to prevent the buy-out by Cincinnati, Ohio's largest newspaper — the Cincinnati Enquirer — of its majority shareholder, for $17.5 million, the Scripps-Howard interests and were based primarily upon proxy violations. The separate class action of this respondent, Cecile F. Schoen, sought derivatively and by class action allegations to prevent the buy-out upon the same proxy violations, but by Class action allegations and proof attempted to require that the minority shareholders *receive the same and equal consideration for their shares as the majority shareholder* — Scripps-Howard — an issue not

as yet then presented to the District Court. Additionally, the *Schoen* case -- by Class Action allegations -- sought to enjoin the proxy statement violations under § 14 of the 1934 Securities Exchange Act and thereby prevent the expenditure of $17.5 million of corporate funds to acquire only the majority shares of the Enquirer. Such a transaction would have eliminated the entire net worth of the Enquirer corporation.

The District Court after a nine-week trial of the issues enjoined the buy-out of Scripps-Howard by the Enquirer corporation for $17.5 million dollars of Enquirer assets on the basis of the alleged violations of the proxy rules as effected by the "special circumstances" of the case wherein a majority shareholder (Scripps-Howard) sells out at a price not available to the minority shareholders. Respondent's pleadings and proof were replete with the assertion of inherent inequality resulting from the majority sell-out upon terms not available to the minority and was the only case to make such points. Subsequently, there appeared an offer from American Financial Corporation, then an unrelated third party (now the owner of petitioner and added as a party defendant below) to each and every shareholder of the Cincinnati Enquirer (including Scripps-Howard) at $40 per share. The enjoined transaction only provided $35 per share for the majority shares (500,000) of Scripps-Howard and nothing for the minority shares (300,000). The $40 offer was consummated by all and the corporation was not permitted to denude itself at the expense of the minority.

A. THE FIRST QUESTION PRESENTED FOR REVIEW

1. The Court of Appeals Decision is Amply Supported by the Evidence as there were Sufficient Benefits to the Corporation to Support the Fee Award

The District Court's opinion on the merits enjoined the subject transaction because it found certain proxy violations under the "special circumstances" of the instant transaction wherein the majority shareholder's shares were being acquired *without the same offer having been made to the minority* and that the injunction should issue. (App. F of Petition, 76a-80a). The minority shareholders holding 300,000 shares had no market for their shares prior to respondent's case, but was accorded $40 per share after such litigation. The Enquirer corporation had been enjoined from expending $17.5 million illegally.

The District Court found that all counsel in the four shareholder cases were entitled to fees in the total amount of $850,000. The Court of Appeals for the Sixth Circuit affirmed with modification only as to pre-judgment interest because it could not find any abuse of discretion by the District Court in the allocation of fees.

There is no conflict of the Court of Appeals decision with the decision of this Court in *Mills* v. *Electric Auto Lite,* 396 U.S. 375 (1970) and petitioner's claims of conflict is spurious. The decision below as effecting the petitioner is in full accord with prior decisions of this Court. The District Court gave the Court of Appeals ample basis for allocating the entire fee award against the Enquirer. The District Court stated:

> "As to economic benefit, while there is dispute, this much can be said. If the Enquirer had purchased the Scripps shares, *that is,* if the plan had not been restrained, the Enquirer would have paid out $17.5 million in principal and would have lost the income or investments owned by it which had to be liquidated to apply on the purchase price of the stock in the sum of $1,026,748. In addition, the Enquirer would have obligated itself to interest payment on the loan of $15,975,000, and dividend payments on preferred stock on $4,590,000, and payment of premiums on required preferred stock redemption of $600,000, which payments would have totaled $22,191,748, in addition to the $17.5 million in principal previously stated. Also, as to economic benefit, it can be said that the *corporation* . . . received nothing for the $17.5 million it paid for its stock, or would have paid. . . .
>
> . . . We have concluded that as far as economic benefit and other ways this case is unique, and, while we conclude that a significant service was performed by the applicants, and there is strong evidence of economic benefit . . . we cannot put a figure on it, though we can say it is substantial." (App. E of Petition, 54a, 55a)

So the District Court went further than even the "therapeutic benefit" doctrine of *Mills* and actually found "economic benefit" hereinbelow after extensive hearings, the dimensions of which fully support the reduced total fee award of $750,000 as to amount and liability.

B. THE SECOND QUESTION PRESENTED FOR REVIEW

1. The Benefits Produced by all Respondents Counsel for the Corporation Substantiate the Fee Award Without Considering Any Other Benefits to Majority or Minority Shareholders

The best the District Court could do with the benefits created for Scripps and the minority shareholders was to describe those benefits as "incidental." App. E of Petition, 55a. The Court of Appeals agreed and stated in its opinion after a thorough review of the benefits to the corporation:

> "We find no abuse of discretion in the District Court's award of the sum total of fees." (App. C. of Petition, 31a)
>
> * * *
>
> "Incidental benefits to Scripps or minority stockholders, in the absence of an adjudication of fraud or misconduct on their part, does not justify a judgment against them for any part of the attorney's fees." (App. C of Petition, 35a)

The petitioners do not here question the amount of fees, but only the allocation.

The petitioners AFC purchased the entire amount of the outstanding common shares of the Enquirer at the tail end of this litigation and were then made parties hereto for purposes of the fee applications. At the time of the AFC "equal-offer" acquisition of Enquirer, they had been relieved by this litigation of the onus of the enjoined transaction and had $17.5 million additional at their dis-

posal as a result thereof. (Petition, p. 5, 6) They should not be heard now to disavow those benefits.

The references to the District Court's order of Feb. 12, 1971 (App. F of Petition, 64a) enjoining the transaction offers additional bases for allocation entirely to the corporation according to decisions in this Court, (*Mills* v. *Electric Auto-Lite*, 396 U.S. 375 (1970); *Hall* v. *Cole*, 412 U.S. 1 (1973), and in the Sixth Circuit, *Denney* v. *Phillips & Buttorff Corp.*, 331 F. 2d 249 (6th Cir.), c.d. 379 U.S. 831 (1964). The only issue herein is whether or not the record can support fees related to benefits received by the corporation. Respondent submits that it does.

The decisions in *Mills* and *Hall, supra*, are based upon the rationale expressed by this Court in *Sprague* v. *Ticonic National Bank*, 307 U.S. 161 (1939), to-wit: the "common fund" doctrine, utilized as an exception to the general rule that each litigant pay its own attorneys. However, this Court has stated an exception that can be drawn to the aforementioned general rule in certain actions – in order to prevent unjust enrichment – wherein benefits are created for an entity or for a group of people. Those who benefit from the suit should share in its costs or burdens. This approach to fee awards has been consistently taken by this Court in shareholder litigation based upon federal securities law violations, even though there is an absence in those cases of statutory authorization for fee shifting. However, where some benefit is shown to either the corporation or its shareholders (and the two are really inseparable) an award of fees is discretionary as to amount but not as to liability. *Newman* v. *Piggie Park Enterprises, Inc.*, 390 U.S. 400 (1968).

In *Mills, supra*, this Court specifically approved an award of attorney fees to successful shareholder plaintiffs in a § 14 (a) case finding that the successful enforcement of the

securities laws and the statutory policy on which they are based "rendered a substantial service to the corporation and its shareholders." *Mills, supra,* 396 U.S. 396. Payment of such fees by the corporate treasury simply shifts the cost of litigation to the corporation (and its shareholders) who "would have had to pay them if it brought the suit" (*Id.* at 397) and who received the benefits therefrom. The petitioners, of course, did not bring such a suit below even though they were requested to recind the transaction.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Court should not grant the petition for a writ of certiorari in No. 74-1422.

Respectfully submitted,

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